82-1574

No. 82-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

against

PATRICIA COHEN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

CARL A. VERGARI
District Attorney of
Westchester County
Office and P.O. Address
County Courthouse
111 Grove Street
White Plains, New York 10601
(914) 682-2161

By: ANTHONY JOSEPH SERVINO
Assistant District Attorney

RICHARD E. WEILL
Assistant District Attorney

Question Presented

When an individual telephones the police to request that they investigate a shooting which just had occurred within the bedroom of the caller's home and thereafter opens the home to police officers who have responded to the resident's call, is any investigation of the bedroom which follows a "search" within the meaning of the Fourth Amendment and *Katz* v. *United States,* 389 U.S. 347 (1967), so long as the activities of the police are, from their viewpoint, reasonably in the furtherance of the initial request and the resident has not withdrawn the request by reasserting expressly any privacy interest in the home?

TABLE OF CONTENTS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

against

PATRICIA COHEN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner prays that a writ of certiorari issue to review the order of the Court of Appeals of the State of New York, dated February 8, 1983, which affirmed the granting of respondent's motion to suppress evidence, entered in the County Court, Westchester County (Martin, J.) on April 27, 1981.

Opinions Below

The decision of the County Court, Westchester County (Martin, J.), dated April 27, 1981, which granted respondent's motion to suppress evidence, is unreported (Appendix A).

The opinion of the Appellate Division of the Supreme Court of the State of New York in the Second Judicial Department, dated April 26, 1982, which affirmed the order

of the County Court, is reported at 87 App. Div. 2d 77, 450 N.Y.S.2d 497 (2nd Dept., 1982) (Appendix B).

The memorandum, dated February 8, 1983, of the Court of Appeals of the State of New York, which affirmed the Appellate Division's order, is reported at —— N.Y.2d ——, —— N.Y.S.2d ——, —— N.E.2d —— (1983) (Appendix C).

Jurisdiction

The order of the Court of Appeals, State of New York, was dated and entered February 8, 1983. Under New York law, this order "constitutes a bar to the prosecution of the accusatory instrument involving the evidence ordered suppressed, unless and until such suppression order is reversed upon appeal and vacated." N.Y. Crim. Proc. Law § 450.50(2) (McKinney).

This order therefore constitutes a final judgment or decree sufficient to invoke the jurisdiction of this Court under 28 U.S.C. 1257(3). cf. *Miranda* v. *Arizona*, 384 U.S. 436, 498 n. 71 (1966).

Constitutional Provisions Involved

Amendment IV provides as follows:

The rights of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

Statement of the Case

Shortly before 11:45 P.M., September 24, 1976, respondent Patricia Cohen telephoned the Mount Pleasant, New

York police headquarters to report that a person had been shot at her condominium. Respondent placed this call, according to the findings of the County Court, "for the purpose of aiding Dr. Cohen [respondent's husband and victim] and investigating the shooting." A detective, in response to respondent's call, arrived at the condominium at approximately 11:45 P.M. Respondent met him at the door and directed him upstairs to the bedroom where Dr. Cohen lay on the bed, bleeding from the head, with an automatic pistol beside him.

As additional officers began to appear at the residence in answer to respondent's call, the detective returned downstairs to comfort respondent and to find out specifically what had happened. She told him that Dr. Cohen apparently had shot himself while asleep in the bed beside her.

At about 12:30 A.M., the victim was removed to a nearby hospital. Respondent asked police to take her there as well; they did as she requested. Two police officers remained behind to continue the investigation, looking for such things as suicide notes, weapons, some indication that an intruder had entered the premises, or other evidence which might shed light on how the shooting of Dr. Cohen had occurred.

Police ceased their investigation for the night at approximately 3:00 A.M. They secured the premises as best they could under the circumstances; with no key to the condominium, they arranged for a patrol car to cruise the area, keeping an eye on the Cohen residence.

Dr. Seymour Cohen died at 3:45 A.M. from his gunshot wounds.

The Mount Pleasant police, accompanied by the Medical Examiner, returned to the Cohen residence later that morning, September 25, at 10:30 A.M. to continue the investigation, taking detailed measurements and making a more

careful examination of the very items inspected in a cursory fashion the night before. They had not obtained a warrant to search the premises nor had they attempted to locate the respondent and secure her express consent to reenter the condominium. However, while present in the home, at 12:30 P.M. that afternoon, respondent arrived with her father to retrieve some clothing from her son's bedroom. She did not object to, or even question, the police presence in her home nor did she ask to enter her own bedroom.

At 1:20 P.M., September 25, 1976, police left the residence, padlocking the door.

The investigation begun at respondent's request on the night of September 24, 1976 led eventually to her indictment for the murder of her husband. As pre-trial proceedings in this matter took their course, even as testimony was being adduced at trial detailing the procedures conducted by police at the Cohen residence on September 25, 1976 between the hours of 10:30 A.M. and 1:20 P.M., respondent gave no indication, through formal motion or otherwise, that she considered these activities a "search" in violation of her Fourth Amendment rights.

After a jury trial, respondent was convicted of the murder of her husband and sentenced, on March 2, 1979, to serve twenty-five years to life in prison. This judgment was affirmed by the intermediate appellate court, *People* v. *Cohen*, 71 App. Div. 2d 687 (2nd. Dept., 1979), but reversed by the New York Court of Appeals because a proper foundation had not been laid below for certain expert testimony. Accordingly, a new trial was ordered. *People* v. *Cohen*, 50 N.Y.2d 908 (1980).

Upon remand, for the first time, respondent contested the 10:30 A.M. entry of her condominium by police as in violation of her Fourth Amendment rights. Ultimately, she was granted a hearing on this issue. At its conclusion,

respondent argued that "what happened here, in our view, . . . is controlled completely by *Mincey* v. *Arizona* [437 U.S. 385 (1978)]." Transcript of Suppression Hearing, April 22, 1981, p. 227.

Petitioner responded: ". . . counsel said, 'This is *Mincey*. It is the same facts.' We submit, that it is not the same facts. Mincey did not call for the police. He did not say, 'Come to my house.' He did not let them into his apartment." Transcript of Suppression Hearing, April 22, 1981, p. 252. Furthermore, petitioner made the following submission: "This defendant having called the police, this defendant having fully cooperated with the police in an investigation as to how the deceased may have actually suffered those wounds. This defendant having left the police in her house. This defendant having directed them to the bedroom of her house. Did she under that fact pattern have a reasonable expectation as to privacy in that bedroom, and we contend that under the fact pattern, taking all of the circumstances as the Court said should be considered, there was no reasonable expectation of privacy when she directed Officers to a gun shot victim who was in a room." Transcript of Suppression Hearing, April 22, 1981, p. 257.

The County Court, however, concluded "that there is no reasonable view of the evidence which would support a finding that either the emergency exception or the permission continued to the return of the police and medical examiner the next morning, and on subsequent occasions." Decision, April 27, 1981, p. 13; Appendix A, p. 8a. The Court, therefore, suppressed all evidence seized after police departed the Cohen residence initially, at 3:00 A.M., September 25, 1976. As this order encompassed evidence essential to the prosecution's case, petitioner appealed.

On appeal, both to the Appellate Division and to the New York Court of Appeals, petitioner asserted that respondent's affirmative request that police come into her home for

the purpose of investigating a shooting waived her expectation of privacy in the situs of the requested investigation and, accordingly, dissipated whatever Fourth Amendment rights respondent previously may have had in these premises. Exigencies or express permission, therefore, were unnecessary to justify a reentry of the residence to continue the previous investigation; in light of the initial request, any reentry inherently was reasonable. Moreover, respondent asserted, to both courts, that the case of *Mincey* v. *Arizona, supra,* was not controlling as the most striking feature of the instant matter, respondent's request of police, is absent from *Mincey* entirely.

The Appellate Division discounted petitioner's position on both of these issues. Despite her request, respondent's bedroom remained, in the Court's view, a "constitutionally protected area." *People* v. *Cohen,* 87 App. Div. 2d 77, 82 (2nd Dept., 1982); Appendix B, p. 15a. Additionally, *Mincey* was deemed controlling. Thereafter, the New York Court of Appeals affirmed the decision of the Appellate Division, also citing *Mincey. People* v. *Cohen,* —— N.Y.2d —— (1983); Appendix C, pp. 17a-18a.

By their decision, the Courts of the State of New York have held that one who requests police to investigate matters in the interior of her home, nonetheless may claim that this investigation constitutes a search in violation of her rights under the Fourth Amendment of the United States Constitution. Such a position is contrary to the holdings of this Court in such cases as *Katz* v. *United States,* 389 U.S. 347 (1967), *Lewis* v. *United States,* 385 U.S. 206 (1966), and *Smith* v. *Maryland,* 442 U.S. 735 (1979). Furthermore, the New York courts have misconstrued the holding of *Mincey* v. *Arizona, supra,* to require that exigent circumstances be present to justify the warrantless examination of a murder scene, even if this examination does not constitute a "search" within the meaning of the Fourth Amendment.

To redress these conflicts between the decisions of this Court and the determination of significant Fourth Amendment issues by a state court, petitioner files the instant petition.

REASONS FOR GRANTING WRIT

The entry of police onto premises to conduct an investigation, when prompted by an initial request from the homeowner, is not a "search" within the meaning of the Fourth Amendment.

The Fourth Amendment question presented by this petition concerns an issue which this Court never has addressed directly: what Fourth Amendment rights, if any, does an individual retain in her residence when she requests affirmatively a police presence at her home for the purpose of conducting an investigation therein.[1] In constitutional terms, is such an investigation a "search" within the meaning of the Fourth Amendment?

To be sure, many of the principles underlying the Fourth Amendment implications of an investigation upon request have been considered by this Court, but each is in direct conflict with the position of the New York courts upon this federal question, that the Cohen bedroom remained a "constitutionally protected area" despite her initial request.[2]

---

[1] Although respondent never testified below, she maintained that the purpose of her telephone call to the police was solely to obtain medical attention for her husband. However, *nisi prius* found to the contrary: "The Court finds that the police were invited into the apartment by the defendant on the late evening of September 24, 1976 for the purpose of aiding Dr. Cohen *and investigating the shooting.*" Decision, April 27, 1981, p. 11; Appendix A, p. 6a.

[2] This Court has disfavored the use of the term "constitutionally protected area" because it "deflects attention from the problem presented," *Katz* v. *United States, supra,* at 351, as the case at bar illustrates.

In *Katz* v. *United States, supra,* this Court held that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not subject to Fourth Amendment protection." *Id.,* at 351.[3] The Court's position was founded, in part, upon its earlier holding in *Lewis* v. *United States, supra,* that "[a] government agent, in the same manner as a private person, . . . may enter upon premises for the very purposes contemplated by the occupant," *Id.,* at 211, even if his invitation is obtained by deceit, without triggering the proscriptions of the Fourth Amendment. No more occurred in this case. The telephone call placed by respondent, her eager admission of police officers into her home, her pointing their way to the bedroom clearly constitutes a knowing exposure of the Cohen crime scene to police inspection. Moreover, as the courts below found that among respondent's purposes for this request was the investigation of her husband's shooting, police were entitled to enter, or reenter, the home to effect "the very purposes contemplated by the occupant" uninhibited by Fourth Amendment concerns.

Additionally, in a concurring opinion in *Katz,* since adopted by the majority, see *Smith* v. *Maryland, supra,* at 340, Mr. Justice Harlan set forth a twofold requirement which must be met before a government activity properly may be considered a "search" under the Fourth Amendment: "first that a person have exhibited an actual (subjective) expectation of privacy." *Katz* v. *United States, supra,* at 361. The initial focus, therefore, is not upon what, in hindsight, was the individual's "actual (subjective) expectation," but rather what expectation this individual "exhibited" at the time. The findings below include no exhibition of a privacy expectation by respond-

---

[3] The principles of the *Katz* doctrine were emphasized by petitioner in all state proceedings regarding this matter, see Statement of the Case, *supra,* even if the specific cases at issue were not cited by name.

ent on September 24 or 25, 1976. Indeed, when respondent entered the premises at 12:30 P.M., September 25, while police were continuing the investigation which she had requested, she did not once, in the words of *nisi prius*, "question the police present in the condominium." Decision, April 27, 1981, p. 10; Appendix A, p. 6a.[4]

Secondly, Mr. Justice Harlan required that the privacy interest, when it is exhibited, "be one that society is prepared to recognize as 'reasonable'." *Katz* v. *United States, supra,* at 361. Is it "reasonable" to hold, as the state court has held, *People* v. *Cohen,* 87 App. Div. 2d 77, 79-81: Appendix B, pp. 12a-14a, that one who asserts *no* privacy interest is deemed to have such an expectation when police secure premises and later reenter but *not* when the presence of police in a residence is continuous, despite the fact that the former situation is far *less* intrusive than the latter?

The decisions of this Court call into serious question this holding by the state court.

Respondent, in opposition, will rely almost entirely upon the language of the New York Court of Appeals, that "the County Court expressly found . . . that the defendant's consent to the initial entry did not extend to the ones the police effected on the following mornings and thereafter." *People* v. *Cohen,* —— N.Y.2d —— (1983); Appendix C, p. 17a. Petitioner cannot, and does not, take issue with this finding. No consent was obtained by police for the 10:30 A.M. reentry of the Cohen residence. With respect, however, respondent's position and, for that matter, the position of the Courts of the State of New York do nothing more than beg the very question pre-

---

[4] Petitioner does not contend that respondent lacked the requisite "standing" to claim that a Fourth Amendment "search" had occurred in her residence. Her property interest in the premises gives her the "standing" to advance her claim; nonetheless, it does not mandate the result.

sented herein: was it necessary to obtain this further consent?

The voluntary "consent" to search is solely a waiver of the Fourth Amendment warrant requirement, and the factual determination which a warrant represents. *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973). Consequently, "consent" is unnecessary when a warrant is unnecessary. If respondent cannot first fulfill the requirements of *Katz*, the reentry by police is not subject to Fourth Amendment protections and no warrant is needed. Accordingly, whether or not "consent" is obtained ceases to be an issue.

Moreover, the fact that the 10:30 A.M. reentry was not authorized by respondent's express "consent" cannot alter the effect of the initial request upon respondent's Fourth Amendment rights. The "request for an investigation" and the "consent to a search" are two fundamentally different concepts as they relate to the Fourth Amendment. One who "consents" acquiesces to a procedure initiated by the police, designed to accomplish police objectives. One who "requests," on the other hand, seeks the police to accomplish *her* objectives. The implicit acquiescence present in every "consent" situation, the very factor which has prompted this Court to impose a burden upon the prosecutor to establish such "consent" unique in cases involving the Fourth Amendment, *Bumper* v. *North Carolina*, 391 U.S. 543 (1968); *Schneckloth* v. *Bustamonte*, *supra*, is non-existent when a "request" initially has been made.

In a sense, respondent's "request" presents the Fourth Amendment equivalent to *Oregon* v. *Mathiason*, 429 U.S. 492 (1977). In *Mathiason*, this Court held that when an individual initiates police interrogation, he foregoes the constitutional protections embodied in the *Miranda* rule. Likewise, when respondent initiated the inspection of her home, she dispensed with all of the protections encom-

passed by the Fourth Amendment. As with *Mathiason*, respondent retained the right to abort the police activity at any time by an express objection, but no such objection was made. However, because a request occurred, the prosecution no longer was required to establish respondent's voluntary "consent." Rather, the burden shifted to the respondent to demonstrate that after making her request she exhibited to police a privacy interest in her home, something which respondent did not do. Thus, as long as the police were engaged in the activity requested initially by respondent, and respondent did not expressly withdraw her request, the Fourth Amendment extended no protection to her.

Similarly, once the protections of the Fourth Amendment no longer applied to respondent, because of her request, the doctrine of *Mincey* v. *Arizona* could not be invoked to invalidate the activities of the police. The *Mincey* doctrine, relying upon the case of *Michigan* v. *Tyler*, 436 U.S. 499 (1978), holds in pertinent part that an individual does not relinquish his Fourth Amendment rights in his home merely by committing the crime charged or by subjecting himself to arrest for it. *Mincey* v. *Arizona*, *supra*, at 391. However, neither of these cases present the quintessential feature of the instant matter: the request by respondent for police to investigate the crime at bar. This added fact, this intentional relinquishment of the privacy of the home, renders the application of *Mincey* by the New York courts to the instant situation an error which, in and of itself, warrants the clarification of the Supreme Court of the United States.

Petitioner notes additionally that the dearth of appellate authority on the Fourth Amendment implications of the "investigation upon request" is not limited to this Court. As well as petitioner can discern, only the United States Court of Appeals for the Eighth Circuit and the Supreme Judicial Court of Maine previously have passed upon the

question. *Thompson* v. *McManus*, 512 F.2d 769 (8th Cir. 1975); *State* v. *Fredette*, Me., 411 A.2d 65 (1979). Although each court analyzed the question differently, each properly focused upon the fact that the investigation conducted by police remained within the apparent scope of defendant's request and that the defendant never amended expressly the initial request in any way. The propriety of the police conduct in each case, therefore, was upheld.

Finally, petitioner asks this Court to consider the issue presented for a brief moment stripped of legal verbiage and to recognize the practical effect of the New York rationale upon fundamental Fourth Amendment interests. Respondent herein plotted the murder of her husband and sought to disguise her crime as his suicide. She thought she could fool everyone—even the police. She wanted the police to examine that bedroom with a fine tooth comb with the expectation that the results of this investigation would convince authorities that a suicide in fact had occurred. To allow such an individual to claim later that this very investigation, which she had requested and encouraged, was a violation of her constitutional rights, and to suppress evidence upon such a claim, undermines what little faith the populace now has in the Fourth Amendment and its exclusionary rule. The instant petition, therefore, seeks to redress both a singular injustice foisted upon the criminal justice system by a criminal defendant as well as the grievous aberration of Fourth Amendment doctrine promulgated by the Courts of the State of New York.

CONCLUSION

For the reasons set forth herein, this Petition for a Writ of Certiorari to the Court of Appeals of the State of New York should be granted.

Respectfully submitted,

CARL A. VERGARI
District Attorney of
Westchester County
Office and P.O. Address
County Courthouse
111 Grove Street
White Plains, New York 10601
(914) 682-2161

By: ANTHONY JOSEPH SERVINO
Assistant District Attorney

RICHARD E. WEILL
Assistant District Attorney

Appendix A.

COUNTY COURT WESCHESTER COUNTY
STATE OF NEW YORK
Indictment Number 547-77

PEOPLE OF THE STATE OF NEW YORK,

against

PATRICIA COHEN,

Defendant.

"DECISION"

Courthouse
111 Grove Street
White Plains, New York
April 27, 1981

BEFORE: HON. LAWRENCE N. MARTIN,
Judge of the County Court

APPEARANCES:

CARL A. VERGARI, District Attorney
111 Grove Street
White Plains, New York 10601
By: JOSEPH K. WEST, Assistant District Attorney

LITMAN, FRIEDMAN, KAUFMAN & ASCHE, ESQS.
Attorneys for Defendant
120 Broadway
New York, New York 10005
By: JACK T. LITMAN, ESQ.
AND: RUSSELL M. GIOIELLA, ESQ., of counsel

STEVEN S. SACRIPANTI
Court Reporter

Appendix A

The Court: The Court's decision and the order on the motion is as follows:

First of all, I would preface it by saying I don't think I put fully into the record my decision when I was directing the hearing, in that I didn't put all my reasoning into the record because while I was expressing my reasoning, I was interrupted by counsel's arguments about what was in the papers. The Court was convinced that the initial papers were insufficient, and it was only based on the latest affidavit submitted by counsel for the defendant, that any facts sufficient to justify a hearing were presented, and the Court, based on that, also based on some of the disclosures that came out on the hearing to suppress statements was of a feeling that it was in the interest of justice that it would be wrong to deny a hearing, even at that late date, and particularly since Judge Rubin had very kindly given us the right to decide that motion de novo.

Therefore, we ordered a hearing on the circumstances under which the property in evidence, and any observations were obtained by the police at the apartment. The Court's decision after the hearing is as follows:

The defendant is charged with murder in the second degree, and criminal possession of a weapon in the second degree. The motion is one to suppress all physical evidence and testimony of observations as having been obtained in a warrantless and unreasonable search of the defendant's home.

The burden of proof, the Court finds, is upon the People, since all warrantless searches are presumptively all unreasonable, and the Court would refer the People to *People* v, *Calhoun,* and a number of other cases in that regard. There is not only a burden of going forward, but a burden of proof. Thus, the People have a burden, not only of going forward with the evidence as in a probable cause hearing, but also must prove that the search fits within one of the recognized exceptions, such as emergency and consent.

Appendix A

The Court finds that all of the witnesses that testified before it on this hearing were trustworthy and believable. The only real conflict in the evidence is as to the time and by whom certain photographs were taken. The Court finds that former Detective Curto's version of this is more logical, and accepts it over former Detective Cioffredi's version. The Court attributes the difference of the long passage of time, and a dimming in the memory is not in any way an inference that either of them was untruthful.

The Court makes the following findings of fact, that at approximately 11:45 P.M., on September 24, 1976, Detective Cioffredi was the first officer to arrive at the defendant's condominium. He responded from a diner where he was eating. It was in response to a call from the defendant to police headquarters that a person was shot. When he arrived at the defendant's home, the defendant was at the door and directed him up the stairs where he found his way up the stairs in the dark, putting on lights to get into the bedroom where he found, on the bed, Dr. Cohen, bleeding from an apparent gunshot wound from the head, an automatic pistol was to his right side on the bed, and Patrolman DeRosa arrived shortly thereafter and took over the first aid to the victim, and was up in the bedroom area with the victim. Detective Cioffredi went and tried to comfort the defendant who was downstairs, and also to find out what had happened, and while doing this he viewed the living room and the kitchen. The defendant indicated that the victim had apparently shot himself while she was asleep in the same bed with him. Lt. Alagno arrived at the condominium, and went to the bedroom and observed the victim, and the automatic pistol, and he took the gun and unloaded it, and held it for evidence. He also observed the living room and the kitchen during this portion. The victim was removed by ambulance at about 12:20 to 12:30 A.M. At about 12:30 to 12:40 A.M., Lt. Alagno left

the condominium with the defendant, who had requested to be taken to the hospital. At this point, Detective Cioffredi went to the bedroom and began a search of the area around the bed for possible suicide notes, and other weapons. He also checked the condo to see if any possible third party could have shot Dr. Cohen, and still be hiding on the premises. During his check of the area around the bed, he found two notes which were in open view on the table, which he seized. He also examined the area of the bed where Dr. Cohen had been found, and in examining that bed he found two live rounds, and a spent shell casing behind the head of the bed on the floor. He took photos of these items as well as the bed, exhibits 19, 21 and 22. He also observed two bullet holes in the drapes behind the head of the bed, which were in the folds of the drapes, and a holster was observed lying in open view on the table, and also men's clothing were draped over a chair.

The Court finds that the photos, exhibits 16, 17 and 18, were taken later that day by Detective Curto, and were not taken by Cioffredi. Patrolman DeRosa was with Detective Cioffredi when he examined the bedroom, and found the shells, and the bullet holes and the holster. DeRosa then left to replace Lt. Alagno at the hospital with the defendant, and Lt. Alagno returned to the condominium at about 2 AM. Lt. Alagno and Cioffredi then found the victim's keys in his jacket hanging in a closet, and went to the garage and examined Dr. Cohen's car, finding a vial with pills in the glove compartment of that car. A call then came in from DeRosa at the hospital that the slug that had pierced Dr. Cohen, apparently passed through Dr. Cohen's head, and might be in the area of the bed. Detective Cioffredi and Lt. Alagno then examined the bed area and the holes in the drapes, and looked behind the night stand where they found the slug on the floor. Exhibit 20, the photo was then taken of that slug where they had found it behind the night table. There were then

two telephone conversations with the medical examiner's office, and another call to DeRosa at the hospital. Just before leaving, Lt. Alagno looked in the attic and checked for a possible intruder but found nothing. The officers did not have a key to the apartment, and could not lock it. They shut the door and arranged to have a patrol keep an eye on the premises. Cioffredi took the weapon, the holster, the live round and the spent casing from the floor, the expended slug, the notes and the pills from the glove compartment of the car with him when he left. His examination of the apartment showed that there was no sign of any third person, nor any sign of any forced entry in the premises. The Court also finds that there was nothing at this point taken from drawers or in closets other than the keys of the victim from the jacket pocket, and that no other things were found in what we would refer to as private places, such as drawers, or closets or cabinets. Although the police looked in them after some preliminaries—excuse me, Detective Curto entered the case at about 7 AM that morning. After some preliminaries he went to the medical examiner's office where he spoke with Dr. Roe, and Paparo. They indicated suspicion of homicide based on the wound. Curto arranged to go to the condominium with Dr. Paparo, and called Lt. Alagno and Chief Oliva to meet them there. They examined the entire premises and searched throughout, and Curto then took the photos which have been marked Defendant's Exhibit B, D, E, 16, 17, 18, 23, 25, 26, 27 and 28. They lined up the holes in the curtains or drapes with a dummy, and a dowel, and they had Lt. Alagno lie on the bed to re-enact the scene. The police seized bedding, a portion of the canopy or drapes, Dr. Cohen's clothing, a nightgown, a coffee cup, two pills or capsules from the bathroom. The defendant then arrived at the condominium with her father at about 12:30 PM as the search was going on, and was

permitted to take some of her clothing from her son's bedroom but under police surveillance. She did not ask to take anything from her own bedroom, or question the police present in the condominium.

Now, after September 25th, Det. Curto returned to the condominium on at least two other occasions having padlocked the premises. On October 1st, he seized a wine bottle, and two wine glasses, and took them to the laboratory. He also took measurements, which resulted in a drawing which is exhibit 24 in the hearing. He also checked out the TV on that night, in short, on the late morning of September 25th. The police returned after searching the condominium from top to bottom, opening drawers and cabinets and examining contents on October 6th. Curto seized, returned to the condominium and seized green towels and other items. Dr. Cohen's wallet had been seized by Lt. Alagno on the late morning of September 25th when he had returned there. The police never obtained a search warant, and never asked the defendant directly for permission to search, or seize any items from her apartment.

The Court makes the following conclusions. The Court finds that the police were invited into the apartment by the defendant on the late evening of September 24, 1976 for the purpose of aiding Dr. Cohen and investigating the shooting. The initial entry and observations and seizures come not only within the emergency exception but within the consent exception. It is beyond any question that the observations made by the police at the condominium, through the removal of Dr. Cohen and the seizure of the weapon, were lawful and did not violate any possible constitutional rights of the defendant.

The Court further finds that leaving police at the condominium to go to the hospital, taking this fact with the fact that she called the police and asked them to enter,

amounted, under the circumstances of this case, to a consent to remain, and to make a reasonable investigation of the immediate area of the bed where Dr. Cohen had been found, and to check the house for intruders and signs of forced entry.

The Court finds that this investigation reasonably included the examination of the bed, the area behind the bed where the shell and live round were found, the examination of the drapes at the top of the bed, and the discovery of the bullet hole in it. The finding and seizure of the notes on the table, near the bed, and the ultimate discovery and seizure of the slug behind the nightstand, the Court finds that the police were in reasonable pursuit of this investigation in taking the photos, exhibits 19, 20, 21, and 22. The Court finds that the examination of Dr. Cohen's automobile was not an invasion of the privacy, or the rights of the defendant. It was the property of Dr. Cohen. The police had a right to be in the condominium, and to look through it for a possible third person. In doing so, they were within their rights in examining the auto of the victim. The pills seized from the auto may therefore be used in evidence. The holster which was lying in open view in the bedroom, was also property seized. Detective Cioffredi may also testify to his general observations made in the condominium. The lack of any finding of signs of forced entry, and the lack of any findings of any third person. He may not testify as to anything he may have found in dresser drawers, or anything of that nature, if in fact he did look in them. These seizures were all made incidental to the initial emergency, and the consent of the defendant. *Mincey* v. *Arizona,* and the cases following it do not require the police to immediately leave upon the removal of the victim. The Supreme Court left it to the Arizona Court to determine whether subsequent investigations fit into any of the other exceptions of this search warrant requirement.

Appendix A

This Court finds that the police acted reasonably in continuing their on-the-scene investigation, as it took place up to 3 AM, and Detective Cioffredi and Lt. Alagno left the premises.

The Court concludes that there is no reasonable view of the evidence which would support a finding that either the emergency exception or the permission continued to the return of the police and medical examiner the next morning, and on subsequent occasions. There is no right of search given to medical examiners which is superior to that of the rights in the constitution. If the police or the medical examiners wanted to examine the condominium, or to have it sealed, they were required to seek Court order. This apparently occurred to the police after they wisely contacted the District Attorney's office but unfortunately were given faulty legal advice.

The Court finds that in that regard, that the defendant had counsel, and that she could not, at that point, waive further her rights without the presence of counsel to permit the continuing search.

The Court must therefore suppress all the evidence and observations made by the police, or the medical examiner's personnel after 3 AM, September 25, 1976 at the condominium.

The foregoing constitutes the decision of the Court, and its order on the motion, and both the People and the defendant have exceptions for the record to those portions of the decision which go contrary to their motions and positions.

Appendix B.

April 26, 1982

SUPREME COURT APPELLATE DIVISION
SECOND JUDICIAL DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK, Appellant, v. PATRICIA COHEN, Respondent.

APPEAL from so much of an order of the Westchester County Court (LAWRENCE N. MARTIN, JR., J.), entered April 27, 1981, as suppressed certain physical evidence.

APPEARANCES OF COUNSEL

Carl A. Vergari, District Attorney (*Anthony Joseph Servino* of counsel), for appellant.

Litman, Friedman, Kaufman & Asche (*Richard M. Asche, Lewis R. Friedman, Herman Kaufman, Jack T. Litman* and *Russell M. Gioiella* of counsel), for respondent.

OPINION OF THE COURT

MOLLEN, P. J.

On this appeal, we are called upon to determine the lawfulness of a warrantless search of the defendant's apartment by police who had been summoned to investigate a shooting. The case reaches us in the posture of an appeal by the People from so much of an order as suppressed certain evidence found in the course of the search.

On the evening of September 24, 1976 the police received a telephone call that someone had been shot at the condominium apartment shared by Dr. Seymour Cohen and his wife, defendant Patricia Cohen. The first officer arrived at the apartment at approximately 11:45 P.M. and met the

defendant who directed him upstairs to the bedroom. There he discovered Dr. Cohen, lying on the bed, bleeding from an apparent gunshot wound to the head. An automatic pistol lay alongside him. The defendant told the officer that her husband had apparently shot himself as she lay beside him asleep in their bed.

Arriving police officers administered first aid to Dr. Cohen and then removed him to a hospital where he later died of his wound. The defendant, apparently grief-stricken, was permitted to go to the hospital to be with her husband.

Meanwhile officers began searching the apartment for suicide notes, other weapons, and the presence of possible intruders who might have been responsible for the shooting and who might still be hiding on the premises. The police seized the gun found on the bed as well as two notes which were lying in open view on a table in the bedroom. They also discovered and seized two live rounds and a spent shell casing. Later they found the bullet which had apparently passed through Dr. Cohen's head. Other tangible evidence was also seized from the apartment and from the Cohens' car.

At approximately 3:00 A.M., the last officers left the apartment. Having no key, they were unable to lock the door. They did, however, arrange to have officers on patrol in the area keep an eye on the apartment since they knew that the police would return the next morning to continue the investigation and search.

The following day, the police received word from the medical examiner's office that the nature of Dr. Cohen's wound raised suspicions that his death had been a homicide rather than a suicide. At approximately 10:30 or 11:00 A.M., police officials and the medical examiner returned to the condominium and searched the apartment "from top to bottom", seizing physical property, taking photographs and measurements, and re-enacting the shooting. At ap-

proximately 12:30 P.M., the defendant arrived accompanied by her father. She was escorted by the police to her son's room where she was permitted to take some of his clothing. She was told that the apartment would be sealed off and, indeed, when the police left at approximately 1:00 P.M., they padlocked the door. Police officers returned to the apartment on at least two subsequent occasions, seizing additional evidence.

At no time did the police obtain or apply for a warrant to search the apartment.

The defendant was subsequently indicted for the murder of her husband. Following a jury trial, she was convicted of murder in the second degree and criminal possession of a weapon in the second and third degrees. Ultimately, citing trial errors which are not relevant to the instant appeal, the Court of Appeals, *inter alia,* reversed the defendant's murder conviction and ordered a new trial (see *People* v. *Cohen,* 50 NY2d 908, revg 71 AD2d 687).

Upon remand to the County Court, the defendant for the first time moved to suppress certain statements she had made and certain physical evidence seized from her apartment. She explained her failure to make such a motion earlier by contending that her statements were subject to suppression only under recently announced State law and that the branch of her motion which was to suppress physical evidence was grounded on facts first learned at her trial.

Eventually, the defendant was afforded a hearing on both branches of her suppression motion. At the conclusion of the hearing, the court, *inter alia,* suppressed all tangible evidence seized and all observations made at the Cohens' apartment after 3:00 A.M. on September 25, 1976. It is from this portion of the court's order that the People now appeal. There should be an affirmance

In arguing that the police lawfully seized evidence upon their re-entry into the defendant's apartment, the People

rely largely on our holding in *People* v. *Neulist* (43 AD2d 150). The defendant, on the other hand, contends that *Neulist* no longer represents the law because it is irreconcilable with the Supreme Court's later decision in *Mincey* v. *Arizona* (437 US 385). We need not reach the question of whether *Neulist* remains viable, however, because we conclude that it is plainly distinguishable from the case at bar.

In *Neulist* (*supra*), the police arrived at the defendant's home in response to a report that his wife had been found dead in the bedroom. A preliminary investigation and medical examination led to a tentative determination that death had resulted from natural causes, although the possibility of homicide was not ruled out. When the body was removed from the house, most of the officers left the scene. Policemen were posted as guards, however, and were instructed to permit no one to enter the decedent's bedroom. No restrictions were placed upon the family's use of the rest of the house. Within an hour of the police departure, detectives returned to the house, having been informed that an autopsy disclosed that the decedent had been shot to death. The returning detectives conducted a search and seized certain evidence which was later sought to be used against the defendant.

In upholding the admissibility of the evidence seized in the course of this warrantless search, we wrote that "[t]he crucial elements [were] the posting of the guard, thereby establishing a continuing police presence on the scene, and the relatively brief lapse of time between the removal of the body and the continuation of the investigation." *People* v. *Neulist*, 43 AD2d 150, 155, *supra*.) In the case at bar, these "crucial elements" are absent. The police here posted no guard and, hence, when they left the apartment at 3:00 A.M., the police presence at the scene came to an end. Moreover, the investigation here did not resume until some eight hours after the police left the scene. We note

additionally that, in *Neulist*, as the search progressed, officers applied for and obtained four search warrants in connection with the case. In contrast, in the instant case, there was no effort to obtain a warrant.

Similarly distinguishable is our recent holding in *People* v. *Dancey* (84 AD2d 763). There, the defendant sought police assistance, claiming that she was locked out of her apartment in which her five-month-old baby had been placed in a plastic bag. At the defendant's request, officers broke into the apartment and, in a closet to which the defendant directed them, they discovered the child "apparently deceased". The officers rushed the baby to the hospital in an unsuccessful attempt to save its life. Meanwhile, the defendant accused her husband of having placed the baby in the bag. Shortly thereafter an officer was directed to return to the apartment to guard against the loss of relevant evidence.

At the precinct, the defendant changed her story and admited placing the baby in the bag. An investigating detective then returned to the apartment, which was still under police guard, "not to search the premises, nor to gather evidence * * * [but] to better view the physical layout of the place in order to better understand the statements that were being given to him" (*People* v. *Dancey, supra*, p. 763). While there, he observed in plain view a note addressed to the defendant's husband. The note, which contained statements incriminating the defendant, was seized and was later used against the defendant at her trial for the homicide. We upheld the admissibility of the note, writing (p. 764): "In this case the investigating detective went to the apartment, which was already occupied by a police guard. His entrance into the apartment constituted no more of an intrusion into defendant's privacy than did the legitimate presence of the police guard * * *. The detective was not there to search the

premises, nor to gather evidence * * *. He did not find the note pursuant to a search. It was in plain view. Since the police presence in the apartment was a legitimate response to the exigent need to safeguard the crime scene, and the detective's appearance and activities did not exceed the ambit of that presence, the detective had the right to seize evidence in plain view". We distinguished *Mincey* v. *Arizona* (437 US 385, *supra*), noting that (p. 764) "[w]hat was disapproved by the Supreme Court [in *Mincey*] was a four-day warrantless search by * * * detectives who were there for the purpose of finding and seizing evidence to support a prosecution."

In *Mincey* (*supra*), an undercover officer was shot and killed during a narcotics raid on the defendant's apartment conducted by the officer and several other plainclothes policemen. After the shooting, the officers quickly looked around the apartment for other victims and discovered the wounded defendant and two other injured occupants. They did not conduct any further search, however, nor did they seize evidence. Instead, they merely guarded the suspects and the premises for 10 minutes until homicide detectives arrived to take charge of the investigation. Upon their arrival, the detectives began a search which (p. 389) "lasted four days, during which period the entire apartment was searched, photographed, and diagrammed. The officers opened drawers, closets, and cupboards, and inspected their contents; they emptied clothing pockets; they dug bullet fragments out of the walls and floors; they pulled up sections of the carpet and removed them for examination. Every item in the apartment was closely examined and inventoried, and 200 to 300 objects were seized. In short, Mincey's apartment was subjected to an exhaustive and intrusive search. No warrant was ever obtained."

In holding that the search contravened the Fourth Amendment, the Supreme Court rejected the notion that

there was a "murder scene exception" to the warrant requirement. Finding no exigent circumstances to justify the exhaustive four-day search, the court held that a warrant should have been sought, and noted that a police guard at the apartment would have minimized the possibility that evidence might be lost, destroyed or removed during the time required to obtain the warrant. In reaching its decision, the Supreme Court observed (*Mincey* v. *Arizona, supra,* pp. 392-393): "We do not question the right of the police to respond to emergency situations. Numerous state and federal cases have recognized that the Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid. Similarly, when the police come upon the scene of a homicide they may make a prompt warrantless search of the area to see if there are other victims or if a killer is still on the premises. * * * And the police may seize any evidence that is in plain view during the course of their legitimate emergency activities." The court concluded, however, that (p. 393) "a four-day search that included opening dresser drawers and ripping up carpets can hardly be rationalized in terms of the legitimate concerns that justify an emergency search."

It would appear, then, that, when a constitutionally protected area becomes the scene of a crime, the police may subject the premises to a preliminary search and inspection whose scope and duration must be limited by and reasonably related to the exigencies of the situation. Once that preliminary investigation has come to an end, however, no further searches for evidence may be conducted on the premises unless authorized by a warrant.

In the case at bar, the police concluded their preliminary investigation at 3:00 A.M. when they left the Cohen apartment without maintaining a continuing police presence

and without returning to the unguarded premises for nearly eight hours. Upon their return, they proceed to conduct an exhaustive and intrusive "top to bottom" search for evidence without having made any attempt to obtain a warrant. Such conduct, plainly inconsistent with the principles announced in *Neulist, Dancey* and *Mincey* (*supra*) cannot be sanctioned. Accordingly, we hold that the court properly suppressed all evidence gathered by the police after their 3:00 A.M. departure from the defendant's apartment.

LAZER, MANGANO and NIEHOFF, JJ., concur.

Order, insofar as appealed from, unanimously affirmed.

Appendix C.

STATE OF NEW YORK COURT OF APPEALS

THE PEOPLE &C.,

Appellant,

v.

PATRICIA COHEN,

Respondent.

CARL A. VERGARI, DA, Westchester County (Anthony J. Servino of counsel) for appellant.

HERMAN KAUFMAN, NY City, for respondent.

MEMORANDUM:

The order of the Appellate Division should be affirmed.

In granting the defendant's motion to suppress,* the County Court expressly found not only that the defendant's consent to the initial entry did not extend to the ones the police effected on the following morning and thereafter, but that there was no basis in the evidence for the application of the emergency doctrine to justify reentry. These findings have support in the record and, having been affirmed by the Appellate Division, are not subject to further review of this Court (*People* v. *Fernandez*, —— NY2d —— [decd January 6, 1983]; *People* v. *Harrison*, —— NY2d —— [decd November 18, 1982]). Moreover, absent a warrant, the reentry was not sanctioned, without more, by the

* The motion was made following our reversal of the conviction based upon evidentiary errors committed at trial (50 NY2d 1060). There was no abuse of discretion in entertaining the motion to suppress for the first time upon remand (cf. *People* v. *Fuentes*, 53 NY2d 892).

mere fact that a homicide was being investigated (see *Mincey* v. *Arizona*, 437 US 385; *People* v. *Knapp*, 52 NY2d 689, 694). The motion to suppress, therefore, was properly granted. For this reason, we have no occasion to pass upon the alternative theory on which the County Court also premised its determination, *i.e.*, the legal conclusion that, once the defendant to the knowledge of the police had retained counsel, she no longer could "waive further her rights without the presence of counsel to permit the continuing search".

* * * * * *

Order affirmed in a memorandum. Chief Judge Cooke and Judges Jasen, Jones, Wachtler, Fuchsberg, Meyer and Simons concur.

Decided February 8, 1983

82-1574

IN THE

Supreme Court of the United States

October Term, 1982

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

against

PATRICIA COHEN,

Respondent.

RESPONSE TO A PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

HERMAN KAUFMAN
LITMAN, KAUFMAN & ASCHE
120 Broadway
New York, New York 10271-0068
(212) 349-6750
Attorney for Respondent

RICHARD M. ASCHE
JACK T. LITMAN
RUSSELL M. GIOIELLA
Of Counsel

Question Presented

Did respondent, by her conduct in once admitting the police into her home to give medical aid to her mortally wounded husband and look for a possible intruder, forfeit forever her reasonable expectation of privacy in her own home, even though, as the prosecutor concedes, respondent did not consent to any of the three subsequent warrantless entries during which the police conducted exhaustive searches and seizures?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

82-1574

IN THE

Supreme Court of the United States

October Term, 1982

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioner,

against

PATRICIA COHEN,
Respondent.

RESPONSE TO A PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Respondent submits this brief in opposition to the Petition for a Writ of Certiorari to review a ruling of the Court of Appeals of New York, entered February 8, 1983, unanimously affirming an Order of the County Clerk, Westchester County, dated April 27, 1981, granting respondent's pretrial motion to suppress physical evidence under the Fourth Amendment.

Opinions Below

The opinion of the County Clerk, Westchester County, rendered April 27, 1981, granting respondent's pretrial motion to suppress evidence under the Fourth Amendment, is unreported and is reproduced in petitioner's Appendix A.

The opinion of the Appellate Division of the Supreme Court of New York, Second Judicial Department, rendered April 26, 1982, unanimously affirming the decision of the County Court, is reported at 87 A.D.2d 77, 450 N.Y.S.2d 497 (2nd Dept. 1982) and is reproduced in petitioner's Appendix B.

The opinion of the Court of Appeals of New York rendered February 2, 1983, unanimously affirming the decision of the Appellate Division, has not yet been reported, but is reproduced in petitioner's Appendix C.

Jurisdiction

The Order of the Court of Appeals of New York constitutes a final judgment and is thus sufficient to invoke this Court's jurisdiction under 28 U.S.C. §1257(3) to consider the petition for *certiorari*.*

Constitutional Provisions Involved

Amendment IV provides as follows:

The rights of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

---

* New York law permits the prosecution to appeal pretrial suppression orders, provided that the prosecutor stipulates that without the evidence suppressed, the proof available to the prosecutor is "either (a) insufficient as a matter of law, or (b) so weak in its entirety that any reasonable possibility of prosecuting such charge to a conviction has been effectively destroyed." New York Criminal Procedure Law §450.50.

Statement of the Case

The Facts

Prior to her retrial* on an indictment charging her with the death of her husband, Dr. Seymour Cohen, respondent obtained a hearing on her constitutional claim that the police seized certain evidence from her home without a warrant and in violation of the Fourth Amendment, the warrantless seizures having been conducted on September 25, October 1 and October 6, 1976. County Court's findings, unanimously affirmed by the appellate courts below, are as follows:

At approximately 11:30 p.m. on September 24, 1976, respondent telephoned the police to report that she had awakened to find her husband injured from an apparent self-inflicted gunshot wound. A short time later, respondent answered a knock at the door. It was the police. After opening the door, respondent pointed in the direction of the bedroom, upstairs, where her husband lay wounded, and the police entered her dwelling. At no time did respondent ever make a verbal communication to the police which either requested or authorized the police to enter her home. She simply pointed to the bedroom located upstairs.

Once inside the premises, the police administered first aid to the victim, who was observed lying on the bed next to the pistol, bleeding from the head. The police also at-

*Respondent's earlier conviction was unanimously reversed by the Court of Appeals of New York on state grounds, stemming from the improper introduction of evidence tendered to rebut respondent's defense that the victim had sustained a self-inflicted wound. *People* v. *Cohen*, 50 N.Y.2d 908, 443 N.Y.S.2d 446 (1980).

tempted to console respondent, who had reported that her husband had apparently shot himself while respondent was asleep.

Shortly after midnight, Dr. Cohen was taken in an ambulance to a nearby hospital, accompanied by Police Lieutenant Alagno and respondent, who had expressed a desire to be with her husband.

Meantime, two detectives remained at respondent's home and proceeded to conduct a thorough search of the premises, lasting for nearly three hours until 3:00 a.m. The detectives examined the bedroom where Dr. Cohen was discovered, giving special attention to the area around the bed where the victim lay injured. In so doing, the police seized a holster and two notes on a table and two rounds of ammunition and one spent shell casing on the floor behind the bed.

During the search, Lieutenant Alagno returned to respondent's dwelling from the hospital, and the search was extended to other areas of the home. Thus, Alagno and Detective Cioffredi, after seizing the keys to the family car from the pocket of a coat in one of the closets they searched, then went to the garage and conducted a complete search of that area and the vehicle.

The detectives' search was interrupted by a telephone call from the hospital advising that the bullet, which had pierced Dr. Cohen, had passed through his head. Hearing this, the detectives conducted yet another search of the bedroom, locating the slug on the floor behind the bedroom draperies, which had bullet perforations.

The detectives then spoke to a patrolman present at the hospital, which was followed by two telephone calls to the Medical Examiner's office. The search of respondent's dwelling was concluded soon before 3:00 a.m. after the detectives made another search of the premises, including the attic, to make sure that no unlawful intruders were present.

At the hospital, at approximately 2:30 a.m., respondent was questioned by a police officer who was investigating the circumstance of the shooting. Before agreeing to make any statement, respondent made a telephone call from the hospital to an attorney to ask whether she should provide the statement requested by the police officer. The attorney spoke to the officer, told him to take no statement* and instructed him to take respondent home. As found by the County Court,** the attorney advised the officer, "do me a favor, take her right home, and if you need anything, call me."

With the search completed, the detectives, who had taken many photographs, left the dwelling and arranged for a patrol car to watch the home because the police did not have a key; respondent, distraught, after leaving the hospital where her husband had expired, spent the night at the home of her parents.

At 7:00 a.m. the next morning, another detective, named Curto, went to the Medical Examiner's office where he

* The police officer ignored this instruction. The statement taken was subsequently suppressed.

** This finding was made in the course of an opinion granting another pretrial motion (and was made part of the record on appeal in the courts below pursuant to a stipulation between the parties).

learned that one of the medical examiners had suspected that the shooting was a homicide. Curto and a medical examiner went to respondent's home, where they were joined by Lieutenant Alagno and Police Chief Oliva.

Before proceeding to respondent's home, one of the officers contacted the District Attorney's Office to inquire about the necessity for a search warrant. A prosecutor advised that a search warrant was not needed and that the reentry into the respondent's home could be undertaken without a search warrant.

After reentering the home, some eight hours after the conclusion of the initial search, again without a warrant, the officers conducted a "top-to-bottom" search (Appendix A, p.6a). The police then ". . . examined the entire premises and searched throughout, and Curto then took the photos which have been marked Defendant's Exhibit B, D, E, 16, 17, 18, 23, 25, 26, 27 and 28. They lined up the holes in the curtains or drapes with a dummy, and a dowel, and they had Lt Alagno lie on the bed to re-enact the scene. The police seized bedding, a portion of the canopy or drapes, Dr. Cohen's clothing, a nightgown, a coffee cup, two pills or capsules from the bathroom. Respondent then arrived at the condominium with her father at about 12:30 p.m. as the search was going on, and was permitted to take some of her clothing from her son's bedroom but under police surveillance. She did not ask to take anything from her own bedroom, or question the police present in the condominium.

"Now, after September 25th, Detective Curto returned to the condominium on at least two other occasions having padlocked the premises. On October 1st, he seized a wine bottle, and two wine glasses, and took them to the labora-

tory. He also took measurements, which resulted in a drawing which is exhibit 24 in the hearing. He also checked out the TV on that night, in short, on the late morning of September 25th. The police returned after searching the condominium from top to bottom, opening drawers and cabinets and examining contents on October 6th. Curto seized, returned to the condominium and seized green towels and other items. Dr. Cohen's wallet had been seized by Lt. Alagno on the late morning of September 25th when he had returned there. The police never obtained a search warrant, and never asked the defendant directly for permission to search, or seize any items from her apartment." (Appendix A, pp. 5(a)-6(a)).

County Court's Decision Granting the Motion to Suppress

The narrow issue before the County Court was whether respondent, after telephoning the police, permitted the police to make an initial warrantless entry, followed by subsequent warrantless reentries into her home. In deciding this issue, the court was required to determine what inferences to draw from respondent's conduct in answering the police knock at her door, and pointing to the upstairs bedroom where Dr. Cohen lay wounded. Respondent, of course, had never given the police a verbal direction to enter her dwelling.

The Initial Warrantless Entry

The Court ruled that respondent, by her conduct in calling the police to announce that her husband had shot himself, and pointing to the upstairs bedroom, consented to the

initial warrantless entry by the police to perform the following:

1) to administer aid to Dr. Cohen; and

2) to investigate and check out the premises to ascertain whether an intruder was present and locate any possible evidence, especially in the vicinity near the bed where Dr. Cohen was found.

Judge Martin ruled that the initial warrantless entry, lasting from before midnight to 3:00 a.m. on September 25, was legitimately carried out in pursuit of the foregoing two objectives and was thus in accordance with the Fourth Amendment—even though the police did not have a search warrant. This branch of the court's ruling, which was not subject to appellate review in the New York appellate courts, has never been challenged on appeal by either party.

The Subsequent Warrantless Reentries

The County Court condemned the warrantless reentries of September 25, October 1, and October 6. The Court ruled that respondent, by her conduct in answering the police knock and directing the police to the upstairs bedroom, had not authorized any of these warrantless reentries. Respondent, the court concluded, had thus consented only to the initial warrantless reentry into her home.

Additionally, County Court ruled, the police failure to obtain a search warrant for the reentries occurring on September 25, October 1 and October 6 could not be justified under any other exception to the Fourth Amendment. By 10:30 a.m. on September 25, the time of the first warrantless reentry, any emergency occasioned by Dr. Cohen's injuries

had long since passed. Also, there had been ample time for the police to seek the issuance of a search warrant from a magistrate—the reentry on September 25, it will be recalled, had occurred almost eight hours after the police had concluded the first search of respondent's home.

Thus, the County Court ruled that

> "The Court concludes that there is no reasonable view of the evidence which would support a finding that either the emergency exception or the permission continued to the return of the police and medical examiners the next morning, and on subsequent occasions. There is no right of search given to medical examiners which is superior to that of the rights in the constitution. If the police or the medical examiners wanted to examine the condominium, or to have it sealed, they were required to seek Court order. This apparently occurred to the police after they wisely contacted the District Attorney's office but unfortunately were given faulty legal advice." (Petitioner's Appendix A at p. 8a.)

ARGUMENT

Because the petition does not present any Fourth Amendment issues that merit review, *certiorari* should be denied.

The petition for *certiorari* in the present case contains no significant constitutional question justifying review. The real question here was why the police, despite having sufficient grounds for a warrant and ample time to get one, did not seek the issuance of a search warrant before making three separate warrantless reentries (on September 25,

October 1 and October 6) into respondent's home. The failure to seek the issuance of a search warant was thus an error, which cannot be avoided.

The first warrantless search of respondent's home, lasting three hours, was completed at 3:00 a.m. on September 25. At 7:00 a.m., a detective learned that the Medical Examiner suspected the victim's death was a possible homicide. This new information led the investigators to decide that a second warrantless search (and ultimately a third and fourth) of respondent's home was advisable. The investigators wanted to search again for additional evidence of a possible crime and, with the aid of the Medical Examiner, reenact how the victim's death may have occurred.

Decisions of this Court have consistently held that a warrant to search the home must be obtained unless the police are proceeding with probable cause, coupled with exigent circumstances, or the police have obtained the consent of the homeowner to conduct a search without a warrant. *Steagald* v. *United States*, 451 U.S. 204 (1981); *Payton* v. *New York*, 445 U.S. 573 (1980); *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973); *Chimel* v. *California*, 395 U.S. 759 (1969); *Schmerber* v. *California*, 384 U.S. 451 (1948); *Johnson* v. *United States*, 333 U.S. 10 (1948); *Agnello* v. *United States*, 269 U.S. 20 (1925); *see also*, *Florida* v. *Royer*, No. 81-2146, March 23, 1983. None of the foregoing exceptions was established here, and petitioner must therefore be charged with the error in not applying for a search warrant before a magistrate.

There was absolutely no reason not to seek the issuance of a search warrant. That the police were investigating a possible homicide did not excuse the necessity for a warrant. *Mincey* v. *Arizona*, 437 U.S. 385 (1978). Also, there was plenty of time to seek the issuance of a search warrant, and petitioner has conceded throughout these proceedings that there existed no exigent circumstances that rendered a warrant application unworkable or, indeed, even inconvenient to the police.*

Further, petitioner concedes that he "cannot and does not take issue with" findings of the County Court that respondent did not consent to the reentries of the police into her residence either on the morning after her husband had been shot or the reentries occurring five and eleven days later (Petition, p. 9). Petitioner, nonetheless, seeks review of the decisions below, claiming that consent to the reentry was unnecessary because the original intervention by the police was at the "request" of respondent and that petitioner therefore lacked any expectation of privacy in her home. *Cf. Katz* v. *United States*, 389 U.S. 347 (1967).

In short, petitioner would have this Court hold that where a wife, whose husband has been shot in the middle of the night, summons police to aid the victim and secure the premises against the possibility that the shooter might still be lurking about, she is in reality "requesting" the police to search the premises not only when they respond to her initial call for help, but also the next morning, long after the exigency has ended, five days after that, and a week

* Because the police had been ordered to watch respondent's home, and because no one else resided there, there was no threat that anybody would distrub the premises.

after that. Petitioner would further have the Court rule that a "request" made under the circumstances here presented will be transformed after the police finish the business they were "requested" to perform into a perpetual waiver of the right of privacy in the home—even though respondent in the meantime had retained an attorney who had contacted the police and told them to take respondent home and that if they wanted anything further from respondent, they should contact him. (The retention of an attorney prior to the police reentry is completely ignored in the petition.)

Clearly, no genuine issue under *Katz* is raised in this case. The contention, urged in this Court for the first time, that respondent forfeited her reasonable expectation of privacy in the home, is nothing more than a rephrasing of the consent issue, which petitioner agrees was correctly resolved against him in the courts below. Petitioner's claim under *Katz* is founded exclusively on the proposition that there was an "intentional relinquishment of the privacy of the home, . . ." See petition at p. 11. Yet, if respondent did in fact relinquish her right to privacy in the home, this could only occur, on the circumstances here, because respondent *consented* to the police coming into her home repeatedly without a search warant. How else could a homeowner forever relinquish his or her right to privacy in the home, if not by consenting to third parties coming into the home? In short, the question here concerns only the scope of respondent's consent to permitting the police to enter her home without a warrant.

In this Court, petitioner concedes that respondent's consent did not extend to any of the three warrantless re-

entries into respondent's home. That concession is enough to end this Court's inquiry of the matter.

Whether the issue is viewed as the scope of respondent's consent or whether respondent gave up her expectation of privacy in the home, the facts here simply do not support the claim that respondent's conduct was tantamount to a request that the police make repeated warrantless entries into her home. The sole factual basis for the argument that respondent consented to a waiver of her Fourth Amendment rights lay in her conduct, first in telephoning the police on the evening of September 24 to report that she had found her husband injured and, second, her act in admitting the police into the condominium and, without saying a single word, pointing upstairs where her husband lay wounded. Respondent said nothing to the officers either initially or at the time of the reentries (when she was not even present and did *not* let the officers in). Moreover, the officers never *at any time* asked for permission to reenter the condominium without a search warrant. Perhaps most important, *after* the initial entry, *and prior* to any reentry, respondent retained an attorney who specifically advised the police that if they wanted anything further from respondent, the police should contact him. County Court reasonably concluded, after listening to the relevant testimony, that the foregoing conduct of respondent was consistent with authorizing only the initial warrantless entry. This finding was supported by the surrounding circumstances.

Respondent called the police after her husband had been injured. She alone could not dispense whatever aid was necessary to save his life. Her discovery of her husband was late at night, and it was entirely possible that an intrud-

er might still be somewhere in the condominium. Realizing this, County Court ruled that the purpose for her agreeing to admit the police into the condominium was so that her husband could secure aid and to permit the police to carry out a brief, limited investigation extended to the area where the decedent was lying and also to other parts of the premises where it was possible that an intruder might be lurking.

Respondent's consent—as conceded by petitioner and as found by the courts below—was limited to the exigencies of the moment. For example, she did not tell the police to examine the dwelling for the purpose of finding evidence of a possible crime. Nor did she request the police to look for possible clues to help explain how her husband had been wounded. In short, respondent gave absolutely no hint that she would permit any intrusive searches and seizures ultimately performed. She said nothing! To claim that her simple act of telephoning the police and then admitting the officers into the condominium constituted permission for a reentry the next day, for a reentry six days later and for a reentry eleven days later is to stretch logic to the breaking point.

Acceptance of the argument, that respondent's original request that the police enter her home to render medical assistance and search for a possible intruder, resulted in her giving up completely her expectation of privacy in the home would lead to disastrous and absurd consequences. It would mean that respondent, following the departure of the police from her home after the initial entry and search of her home, must be held to have authorized the police to make the following intrusions into her privacy:

1. returning to the condominium the next morning, September 25, when the police conducted an inch by inch search of the premises;

2. making additional seizures of articles of property belonging to Mrs. Cohen during this second search of September 25;

3. cutting off Mrs. Cohen's possessory interests in the premises—the police would only permit her to enter the condominium if she was accompanied by a police escort when she moved through the premises; and

4. making subsequent warrantless searches and seizures at the condominium on October 1 and again on October 6, 1976.

To draw any such inference from the limited conduct displayed here would simply be wrong. To say that respondent permitted the police to make unlimited searches and seizures for an indefinite duration would be no different from arguing that respondent simply decided to turn over possession of her home to law enforcement authorities—simply because there was an original request for the police to enter without a warrant to give aid and look for intruders.

Petitioner, in effect, argues that respondent, by her conduct, converted the inside of a private dwelling to a public place, permanently accessible to all, as in the case of an open field. Compare *Hester* v. *United States*, 265 U.S. 57 (1924); *United States* v. *Case*, 435 F.2d 766 (7th Cir. 1970). Such a claim is astonishing in view of this Court's long standing rule that a person enjoys an exceed-

ingly high expectation of privacy in the home, and this right of privacy is among the most cherished and valuable constitutional guarantees. See *South Dakota* v. *Opperman*, 428 U.S. 364, 367-8 (1976); *Cardwell* v. *Lewis*, 417 U.S. 583, 590 (1974). The homeowner's right to undisturbed occupancy of the premises is thus afforded the "most stringent Fourth Amendment protections." *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 561 (1976). Accordingly, to secure this right from abridgement, the Court has long insisted, beginning with *Agnello* v. *United States*, *supra*, decided nearly 60 years ago, that the police must not enter the home without a search warrant. *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971); *see also Mincey* v. *Arizona*, *supra*; *Wong Sun* v. *United States*, 371 U.S. 481 (1963).

If respondent no longer desired to be left alone inside her home, if respondent decided to make the inside of her dwelling permanently accessible to the public, in short, if respondent no longer decided to treat her home as a home, this must be established by clear, equivocal and convincing evidence. Where the home is concerned, the Fourth Amendment protects a most special interest, which will not be disturbed, absent compelling proof to the contrary. At bar, respondent's limited conduct in once allowing the police to enter her home without a warrant certainly cannot be the basis for a finding that respondent, in effect, intended to give up her home. Such a ruling would read the Fourth Amendment out of existence, which was certainly not the intention of the drafters of the Constitution.

Finally, it must be stressed that this is not a case where the police returned to the home to retrieve an article, lawfully observed in plain view during an earlier lawful entry

and search of the home, and with respect to which there was thus no reasonable expectation of privacy. At bar, the subsequent warrantless reentries were for the purpose of conducting new, independent searches to uncover new, additional evidence that was not the subject of the initial, earlier search. At no time, during these subsequent warrantless reentries, did the police make any move to secure a warrant to enter respondent's home.

Conclusion

For the reasons set forth above, the petition for a writ of *certiorari* to the Court of Appeals of the State of New York should be denied.

Respectfully submitted,

HERMAN KAUFMAN
LITMAN, KAUFMAN & ASCHE
Attorney for Respondent

RICHARD M. ASCHE
JACK T. LITMAN
RUSSELL M. GIOIELLA
Of Counsel